

and such a ceremony should be performed outside the Court-House. In the case of Muslims, the swearing by the Koran should take place in a Mosque after the parties have "purified" themselves.

This appeal is allowed on the ground that the plea of appellant was not properly taken and there is a doubt as to whether the appellant pleaded guilty to one or all the three charges. The conviction and sentence is set aside and I direct that the case be retried before another President.

Appeal allowed. Re-trial ordered.

KHO KONG SENG v. MABBUN

[L.C.J. (Harley J.) January 9, 1964]

[Kuching — Civil Case No. C/121 of 1962]

Tort—Plaintiff suing owner of vehicle for damages—Vehicle driven by son of owner—Whether son driving with permission and authority—Whether son servant or agent of owner—Whether plaintiff entitled to damages.

Master and Servant—Son driving car belonging to father—Whether father liable for son's negligence—Whether son servant or agent of father—Whether son had permission or authority of father.

The plaintiff sued the defendant for damages suffered by the plaintiff in a motor accident. The defendant was the owner of the car which was at the material time driven by the defendant's son. The defence pleaded that the driver was not a servant or agent of the defendant and that the journey during which the accident occurred was entirely on the son's account.

Held: even assuming that the son of the defendant was driving the car with the defendant's authority and permission it was not possible in the circumstances of this case to draw the inference that the son was driving the defendant's car as the defendant's servant or agent, as the son was making the journey entirely on his own account. *Hewitt v. Bonvin* (2) applied.

Cases referred to:—

- (1) *Fowler v. Hawksley* (1951) 2 Kemp & Kemp 2nd Edn. 95.
- (2) *Hewitt v. Bonvin* [1940] 1 K.B. 188.
- (3) *Barnard v. Sully* 47 T.L.R. 557.

ACTION.

T. O. Thomas for the plaintiff.

Defendant absent.

Harley J.: In this case I shall consider damages first, the cause of the accident second, and liability third and last.

Under the special or itemised heads/pecuniary damage I approve:

Hospital charges	\$300.00
Special food (This was not medically or physically necessary)	NIL
Transport (taxi) (This covers a reasonable number of visits. There was no necessity to take taxis every time)	\$200.00
Damage to Bicycle (There was no satisfactory proof of the value of the bicycle or of the extent of damage)	NIL

A	Cash lost in Accident (Plaintiff himself did not mention this item. His mother's evidence did not substantiate it)	NIL
	Surgical boots	\$ 29.00
	To this add for repair and replacement as time goes on	\$200.00
	TOTAL	\$729.00

B

The last item of the above paragraph is strictly part of the general damage. In the pecuniary as well as the bodily sense one has to consider how the plaintiff's future will be affected by the accident. It is most difficult to estimate how far the accident affects plaintiff's earning ability. Certainly it has set him back in his studies. Mentally there should be no permanent effect. Physically, the boy before the accident already had one leg shorter than the other. (The effect of a pre-existing disability was discussed in *Fowler v. A. W. Hawksley* (1)). How much worse plaintiff's leg is because of the

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accident, and how far it will affect the plaintiff now and in the future, are matters covered by P.1 Mr. Cumming-Smith. Plaintiff's expectation of life is not shortened. His pain and suffering must have been severe, and will continue. He has lost in great measure the enjoyment of many of the amenities of life and will throughout his life suffer at the very least physical inconvenience and discomfort. Having read and re-read the medical evidence, and reflected that the effects on plaintiff's physique and on his career interact, I do not consider it necessary to itemise the heads of general damage. I would say that the sum of \$20,000 (twenty thousand) represents and covers the total general damage suffered by plaintiff. Plaintiff, therefore, if he could recover in full, would be entitled to \$20,000 plus \$729.00, total \$20,729.

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Now I come to the question of division of liability, from the causation angle between the driver of the car and the plaintiff riding his bicycle. I accept that the car came very fast and was at first obscured from view, or partially obscured by a rise in the road. I still feel that the boy himself must have been one-third to blame, in crossing the path of the oncoming car, for failing to see it or to take avoiding action. I cannot pretend that I have ever had a clear-cut picture of this accident. The evidence of plaintiff himself and of the eye-witness P.4 fails to convince me that the car was more than two-thirds to blame. Plaintiff therefore, if entitled at all to recover, could only claim two-thirds of the damage suffered.

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Lastly we came to the question whether defendant, the owner of the car, is answerable for the act of the driver who, I can take it, was his son. When Mr. Thomas first closed his case there was no evidence at all to connect defendant with the driver of the car. The defence pleaded

was that the driver was not a servant or agent of the defendant. After closing the case for the plaintiff, Mr. Thomas, with the Court's permission, then himself gave evidence and proved certain correspondence. On this evidence, I think that I must accept that "Rolando K. Mabbun, who was the driver of the car at the time of the accident, did not have any capacity whatsoever, and if anything, we could only say that his capacity was that of being a member of the defendant's family and as such, he had access to the use of the motor vehicle. However, the journey during which the accident occurred was entirely on Rolando K. Mabbun's account."

Assuming that Rolando K. Mabbun was the son of the defendant and was driving with his authority and permission, that still does not necessarily make him the agent of defendant for the purpose of driving the car. On the contrary, the statement of defendant's advocate, on which Mr. Thomas relies, is to the effect that Mr. Rolando K. Mabbun was making a journey entirely on his own account.

The following passages are cited from the case of *Hewitt v. Bonvin* ⁽²⁾ where at p. 191 Mackinnon L.J. said:

"If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorized the act. If he can establish that B was the servant of C the question of authority need not arise. A master is jointly and severally liable with his servant for any tort committed by the servant in the course of his employment. If in this case the plaintiff is to make Bonvin the father liable for the damages he claims he must establish that the son was driving the car as the servant of his father and in the course of his employment

As I see it, the plaintiff, to make the father Bonvin liable must establish, (1) that the son was employed to drive the car as his father's servant, and (2) that he was, when the accident happened, driving the car for the father, and not merely for his benefit and for his own concerns. In my opinion the plaintiff did not establish either of these propositions. The boy took out and used the car, following upon an interview with his mother. Treating the mother as the fully authorized agent of her husband, all that she said or did amounts to no more than: 'I will lend you your father's car for you to use.' He was not employed to drive it as his father's servant, and when the accident happened he was not doing any work of his father's. He was driving his own friend, for his own purpose, and the father had absolutely no interest or concern in what he was doing

It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the court is left without further information it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his: *Barnard v. Sully* ⁽³⁾; but in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data.

... If I am right as to the law, it follows that the learned judge's decision can be supported if, and only if, the evidence proves that the appellant's son was acting for and on behalf of the appellant. Unfortunately it is not clear that the learned judge applied his mind to this precise question. The judge has found that the son had

A permission to drive the car, or at least that his mother, who had authority to represent the appellant, knew that he was taking the car, and knew the purpose for which he was taking it. This finding is consistent with a mere loan or bailment of the car. If, however, this Court had thought that on a fair view of the evidence agency was established, it would clearly have been right to dismiss the appeal. In my opinion agency was not proved. Before us counsel for the respondent relied on the fact that the driver of the car was the son of the appellant. Although it would be absurd to say that such a relationship is of itself evidence of agency, I agree that when considered in combination with other circumstances it may be in some cases both relevant and significant. If, for instance, a father consents to his young son inviting a guest to the family home, and then permits him to use the father's car for the entertainment or convenience of the guest, it may well be a justifiable conclusion that the son is driving for and on behalf of the father. Ultimately the question is always one of fact...."

Following the principles laid down in the above case, I find myself in the instant suit unable to draw inference that Rolando K. Mabbun, who was driving the defendant's car No. K. 6373, was so driving as agent of the defendant. In my view plaintiff's counsel would have done better to join Rolando K. Mabbun as a defendant. I cannot hold the present defendant liable for any damage. This action is accordingly dismissed with costs (excepting of course such costs as have already been ordered in favour of plaintiff).

Action dismissed.

E Solicitor: Thomas & Co.

NASIB SINGH v. PONNUTHURAI

[O.C.J. (Gill J.) January 10, 1964]

[K.L. — Civil Suit No. 750 of 1962]

F *Bills of Sale—Seal—Requirement of—Description of attesting witness as magistrate—Whether sufficient—Void for non-renewal—Whether covenant contained therein to pay also void—Whether money lent recoverable—Bills of Sale Enactment (F.M.S. Cap. 57) ss. 4, 6, 11, 15—Bills of Sale Ordinance, 1950, ss. 4, 6, 13, 23.*

G *Practice and Procedure—Proceedings by writ of summons—Whether procedure correct—Whether by way of originating summons.*

H The defendant executed a bill of sale in favour of the plaintiff on November 30, 1951 for a loan of \$4000. There was no seal on the bill of sale which was attested by a witness who described himself as "Magistrate, Kuala Lumpur". The bill was first registered on November 31, 1951. It was renewed annually in accordance with the provisions of the Enactment until July 31, 1958. It was next renewed on November 24, 1959 when a period of 12 calendar months had elapsed from its last renewed registration on July 31, 1958. No order was obtained from the High Court for extension of time for re-registration of the bill of sale. It was next renewed on April 13, 1962 upon an order of the High Court dated April 2, 1962 whereby time for re-registration was extended until 14 days after the date of the order without prejudice to the rights of the parties acquired prior to the time of actual re-registration. The bill of sale had not been renewed since April 13, 1962.

I The plaintiff commenced an action by writ of summons for the recovery of money lent on the security of the bill of sale. It was contended for the defendant that (a) the proceedings should have been commenced by originating summons as required by section 11